extraordinary remedies, special proceedings, trial practice, declaratory judgments, judgments, new trials, appellate procedure, and federal criminal procedure. With this wide field to cultivate, it will not be strange if some of the germinating corn has been passed unnoticed. No doubt the author felt that something should be left for the instructor using the text, as there are many problems, still unsolved by the courts, which when posed to the student will give rise to stimulating class discussion.

This well indexed book is the best that we have seen for the purpose for which it is intended.

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THE LAW IN QUEST OF ITSELF. *By Lon L. Fuller. The Foundation Press, Inc. 1940* JURISPRUDENCE. *By Edgar Bodenheimer. McGraw-Hill Co., Inc., 1940.*

Writing in 1887 Hastie quotes from Maine[1] (1861) to describe the "widespread dissatisfaction with existing theories of jurisprudence" which existed in England in both their times. For Hastie the evils were an Austinian positivism and "the Utilitarian Principle." The former was "unfruitful in scientific result," and the latter was not "capable of longer satisfying the popular mind with its deepening Consciousness of Right." Today, as evidenced by the two books under review, positivism is again under attack, and the return urged, while not to the metaphysics of Kant, is at least to the rule of reason of natural law.[2] Thus American jurisprudence traverses a cycle which began with a philosophy of natural law, discovered the volkgeist of Savigny, applied the positivism of Austin, developed the utilitarianism of Bentham and the pragmatism of James, only again to seek a "Consciousness of Right" in the methods of natural law.

It is against the extremes of positivism that the present reaction is most usually directed. Whether the nadir or the zenith of jurisprudential theory was voiced by Holmes when he wished the divorcement of all words of moral significance from the law,[3] at least he fathered a thought which in the name of Neo-Realism today seeks a temporary

[1] Translator's Preface to KANT'S PHILOSOPHY OF LAW, p. xxv, quoting from MAINE'S ANCIENT LAW.

[2] For instance: HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS; HARVEY, JEAN JACCUES BURLAMAQUE; OBERING, THE PHILOSOPHY OF JAMES WILSON; LEBUFFE AND HAYES, JURISPRUDENCE; SCOTT, LAW, THE STATE AND THE INTERNATIONAL COMMUNITY.

[3] HOLMES, *The Path of the Law*, COLLECTED LEGAL PAPERS, pg. 179 (1920).

separation of the Is from the Ought. Sociological jurisprudence, too, is positive, but it asks no such temporary severance. It not only recognizes that law is normative, but seeks the content of norms in the "traditionally received ideals of the social order."[4] Theories of pragmatism and of relative as distinguished from positive values, which spread so rapidly after World War One, offered a fertile ground in which both Sociological jurisprudence and Neo-Realism could flourish. But Realism went beyond Sociological jurisprudence, and in the name of scientific method sought empirically to evaluate law in terms of judicial behavior. For this purpose its insistence on a temporary separation of what is from what ought to be in law has earned for it the accusation, whether rightly or wrongly,[6] of being unmoral jurisprudence. But today values, both in and out of law, are being challenged generally. Hence the revival of a jurisprudence which purports to devote more thought to what ought to be seems inevitable.

Professor Fuller's book consists of three lectures which were given at the Law School of Northwestern University in April 1940 under the Julius Rosenthal Foundation for General Law. His subject is natural law versus positivism. "Natural law . . . is the view which denies the possibility of a rigid separation of the *is* from the *ought*, and which tolerates a confusion of them in legal discussion." Legal positivism is "that direction of legal thought which insists on drawing a sharp distinction between the two" (p. 5). The lectures trace the course of positivism from Hobbes through Kelsen and the American Neo-Realists. "They (positivists) insist that their primary object is to promote clear thinking in the law" (p. 85). But, according to Professor Fuller, "the purely formal and verbal nature of the conclusions of legal positivism is revealed in the inability of positivism, in all its forms to deal with the *content* of the law. Not only has positivism failed in its quest for some definite criterion of the law *that is*, but it has failed to say anything significant concerning the law which it assumes to 'be.' Even within the framework of its own premises it remains formal and sterile" (pp. 88 and 89). Thus "American legal scholarship suffers at present from the inhibitive effect of a positivistic philosophy" (p. 128). "The conception which finds the justification for democracy in skepticism is not only demonstrably incapable of sustaining a nation in time of crisis, but it has also, . . . accelerated the disintegrative forces which threaten modern society" (p. 125).

[4] POUND, *Common Law*, ENCYCLOPEDIA OF THE SOCIAL SCIENCES, vol. 4 at pg. 51 (1935).

[6] See McDOUGAL, *Fuller v. The American Legal Realists: An Intervention*, 50 YALE L. J. 827 (1941).

But to the author the rejection of positivism does not "imply a recommendation that we go the whole way in the opposite direction of legal thought" (p. 99). He is not sponsoring "any of the various systems of natural law which have been advocated in the past" (p. 101), nor "the doctrine of natural rights" (p. 100). It is the "broader and freer legal method" (p. 103) of the old books which he advocates. In a double sense this is "natural law." "In the first place, it is the method men naturally follow when they are not consciously or unconsciously inhibited by a positivistic philosophy. . . . In the second place, when reason is uninhibited by positivistic restraints, it tends inevitably to find anchorage in the natural laws which are assumed to underlie the relations of men and to determine the growth and decay of civilizations" (pp. 103 and 104).

Whether or not Professor Fuller has proved his thesis is one thing. That he has stated a problem of values in legal norms is certain. But to the reviewer this statement does not require the rejection of positivism. It simply challenges rationalism to supply a deficiency in modern jurisprudence. A descriptive science of Is law can exist along with a normative science of Ought law. Professor Yntema has pointed this out.[6]

Somewhat similar in objectives to Professor Fuller's lectures is Professor Bodenheimer's text on *Jurisprudence*. He, too, is interested in law's content, and in apprehensive of positivism. He believes that "The modern attack against reason is at the same time an attack against law. Law is primarily a rational institution." It "incorporates certain values which are very largely coextensive with the values of human civilization as such." The positivistic epoch in jurisprudence took the law for granted and looked only to its form." But "when we look at the *form* of the law merely, we shall not be able to detect the essential difference between the power state and the law state." "The challenge to which the law is subjected in our time makes it imperative to reexamine the basic nature and character of this institution" (p. vii). In his investigation, then, "He has attempted to emphasize above all those issues which have some relation to the great political and social struggles going on in the world today. Among those issues the contrast between arbitrary power and law, between totalitarianism and constitutionalism, has received particular attention and has been made the starting point of the discussion" (p. ix). His method is to describe in their purest and most advanced forms those institutions which he admires and also those which he criticises (sec. 60). His assumption is "that legal sociology can maintain its place among the social sciences only if it combines . . .

[6] YNTEMA, *The Rational Basis of Legal Science*, 31 COL. L.R., 929 (1931).

the function of picturing the mature type of law and the task of analyzing the cause of legal evolution, as far as it is feasible" (p. 324). His conclusion is that "only a merger of the methods used by the natural-law jurists with the methods employed by modern sociologists can bring about that rebirth of jurisprudence which seems so necessary in a time which questions the very foundations of the law" (p. 324).

Part I, then, discusses "Power and Law." "Law arises from the tensions and adjustments between society and its rulers" (p. 212). It "is a mean between anarchy and despotism" (p. 19). "Sovereignty" and the "state," however, are still useful concepts (p. 70). But the state should be a law state and not a power state. Hence the task is to circumscribe the exercise of power by the state. This may be accomplished by a constitution and by some system of checks and balances (pp. 25 and 26). Also, individuals as well as states may abuse power. "Law in its purest and most perfect form will be realized in a social order in which the possibility of abuse of power by private individuals as well as by the government is reduced to a minimum" (p. 19). Hence "it is the function of private law to grant, define, and circumscribe the sphere of power which private individuals are to enjoy" (p. 19). This sphere should be neither too wide nor too small (p. 22). In its pure form law "is a relation between equals, not between a superior and an inferior" (p. 21). "From the point of view of pure law, it would almost seem logical to demand an absolute social and economic equality of all men" (p. 27). But in point of fact law, "namely a law which will have eliminated all traces of power relation between men, could never be a permanent condition" (p. 28).

The state administers law, but leaves morals and customs largely to other controls (p. 73). Also there is the matter of administration, which "is the regulation of private or public affairs according to the principle of expediency (p. 87). In its essence administration "is an exercise of power" (p. 91). "Public administration, in particular, is a sphere of free activity by the government. The guiding directive of public administration is the principle of expediency and the will to achieve certain practical results through the application of the most efficient means" (p. 91). "Law and administration are different not only in their concept, but also in their operation and effect" (p. 95). "Law is mainly concerned with rights; administration is mainly concerned with results. Law is conducive to liberty and security, while administration promotes efficiency and quick decision. The dangers of law are rigidity and stagnation; the dangers of administration are bureaucracy and autocracy" (p. 95). Hence, although "an increase in administrative control was

inevitable and necessary in the United States in order to achieve efficiency" (p. 97), its exercises should be carefully surrounded by legal safeguards. "The equal treatment of equal situations is the most fundamental requirement of justice" (p. 98).

This distinction between law and administration is orthodox enough. But it would seem that Professor Bodenheimer's fear of bureaucracy and of power control has led him here into a formal and needless distinction, which excludes from the concept of law a large body of growing precedent which is being established by administrative tribunals.[7] Perhaps in view of authority it is too much to ask Professor Bodenheimer that in the name of reason he disregard form and consider substance. Yet such seems to be his own thesis. It is unfortunate that his method of describing institutions by their advanced forms and his fears of evil consequences potential in such forms, at times distort his evaluations.

Parts II and III are freest from this fault. In Part II the author deals with the Law of Nature, tracing its various schools in a succinct, informative and readable style. Part III treats a selected group of Law-Shaping Forces: political, psychological, economic, national and racial, and cultural determinism.[8] Any student and any lawyer will profit by these descriptions.

Part IV concerns positivism: both analytical and sociological, including with the former a discussion of Bentham and of Jhering. And again predilections becloud the author's appraisals. Thus Kelsen's view "deprives the concept of law of all meaning"[9] (p. 290). So also in discussing Pound's replacement of "rationalism in legal science by empiricism and pragmatism" (p. 301) and his "science of social engineering" (p. 307), it would be well for the author to remember that the science of law neither now nor in the past has awaited the time when philosophers could agree upon what its content should be.[10]

The reviewer agrees with much of the underlying assumption of both Professor Fuller and Professor Bodenheimer: an appraisal of law values is necessary if faith in democracy's law is not only to be felt but to be stated. Further, this would seem to be the task of rationalism. Empirical standards of utility, of pragmatism and of cultural determinism have served their purposes in directing courts to the ends of law. But something more is needed if "received ideals of the social

[7] See FREUND, *Administrative Law*, ENCYCLOPEDIA OF THE SOCIAL SCIENCES, vol. 1 at pg. 454 and 455.

[8] For criticism see Simpson, Book Review, 54 HARVARD L.R. 1088, 1090 (1941).

[9] And see FULLER, pp. 77, 88, 89, 114.

[10] POUND, *Jurisprudence*, ENCYCLOPEDIA OF THE SOCIAL SCIENCES, vol. 8, p. 485.

order"[11] are to articulate the spiritual requirement of the present.

Nor is the problem as simple as when Locke stated our faith and Montesquieu our ideal of government, to combine the spirit and the framework of democracy. Modern iconoclasm and pessimism will not suffice. There is a call for a restatement of values. Professor Fuller's lectures and Professor Bodenheimer's text should indeed be recommended reading for student and for lawyer alike. But in the end the cause of a normative science of law is not advanced by a denunciation of positivism on the one hand and by formalistic legal distinctions on the other.

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BOOK NOTES

ORGANIZATION OF COURTS. *By Roscoe Pound. Little, Brown & Co., Boston, Mass. 1940.*

For several reasons *Organization of Courts* published under the auspices of the National Conference of Judicial Councils, is a volume that should be read by every member of the legal profession and by many laymen.

In the first place the author is Honorable Roscoe Pound, Dean Emeritus of the Harvard School of Law, who, in addition to his extended career as a law teacher and writer, acquired valuable experience as a member of the Supreme Court Commission of his native state of Nebraska.

Secondly, in these critical days accurate information with reference to the judicial branch of the government is of great general value. It is undoubtedly accurate to say that most citizens possess a fairly definite concept of the simpler functions of the legislative and executive branches of our government. While it is of course true that during the last four or five years popular attention has been attracted to the courts by reason of the unusual number of momentous decisions announced, nevertheless to many citizens their courts remain mysterious and forbidding institutions; and the higher the court, the more general seems to be the prevalence of this unfortunate illusion.

In the third place Dean Pound has assembled valuable and inter-

[11] POUND, *Common Law*, ENCYCLOPEDIA OF THE SOCIAL SCIENCES, vol. 4 at pg. 51. Supra note No. 4.